LE COPY

FILED
JAN 10 195
HAROLD B. WILLEY,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

## No. 532

*In re* GEORGE ANASTAPLO,

*Appellant*

On Appeal from The Supreme Court of Illinois

## Jurisdictional Statement

GEORGE ANASTAPLO,
*Counsel pro se*
6026 Ellis Avenue
Chicago 37, Illinois

# INDEX.


| | PAGE |
|---|---|
| Opinion below* | 2 |
| Jurisdiction | 2 |
| Statutes involved | 4 |
| Questions presented | 5 |


* There is more than one version of the opinion of the court below. The later version, printed in the Appendix, is taken from the advance sheets of the Illinois Official Reporter published Oct. 27, 1954 (3 Ill. 2d 471). The version filed Sept. 23, 1954 by the court below reads "could not in good faith take" where there is now "might not be able in good faith to take" (App., page 43, line 12, **infra**). (With either reading, there is here a sentence which contains one of the striking misstatements by the court below of the undisputable facts in the case. See pp. 11-14, **infra**.)

The earlier version was supplied appellant and is to be found at 36 Chicago Bar Record 67 and in 121 N.E. 2d 826, at 828. It is, we suggest, the version with more support in the Record. The later version, on the other hand, would seem to strengthen the position of the court below with respect to the subsidiary question discussed in the first part of Note 30, **infra.**

The discrepancy was noticed for the first time after this Jurisdictional Statement was in page proofs. Consequently, it has seemed appropriate to insert here a note rather than to alter any part of the Statement on this account. (Thus, the excerpt from the opinion at page 11, **infra,** continues to be drawn from the earlier text which was supplied appellant.) We know of no ruling authorizing a change which seems of an order markedly different from the rather formal stylistic and clerical modifications found at various other points in the later version of the opinion (App., p. 46, lines 17-31; p. 47, l. 17; p. 52, l. 24). In any event, those responsible for changes have neglected to advise appellant. **Cf.** pp. 22-24 ("the two cases"); **cf.** also, the latter parts of Notes 3, 5, **infra.**

PAGE

Statement of the case ..... 8

1. Chronology of events ..... 8
2. Matters discussed and issues framed during appellant's examinations ..... 10
3. How the federal questions are presented ..... 18

The questions are substantial ..... 22

Introduction: the two cases ..... 22

1. Statutes void for vagueness; other due process considerations ..... 24
2. Free-Speech Problem—Part I: Penalization for the expression of legitimate opinions ..... 26
3. Free-Speech Problem—Part II: Consequences of a refusal to answer certain inquiries or to subscribe to test oaths ..... 27
4. Constitutionality of the inquiries into affiliations ..... 33
5. "Unconstitutional conditions" ..... 35
6. Importance of the questions ..... 37
7. Federal-State relationships ..... 39

In closing: the two follies ..... 40

Conclusion ..... 40

Appendix: Opinion below* ..... 41

CONSTITUTIONAL DOCUMENTS CITED.

Article I, Sec. 10, Const. ..... 6, 7, 22

Article III, Const. ..... 22

Article VI, Const. ..... 30

Amendment I, Const. ..... 6, 7, 18, 22, 26, 27, 29, 30, 32, 35

---

* See note, **supra**, page i.

PAGE

Amendment V, Const. ..... 30

Amendment XIV, Const..... 5, 6, 7, 8, 18, 20, 22, 24, 26, 27, 28, 29, 32

Declaration of Independence .....5, 11, 12, 15, 23, 26

Article V, Sec. 25, Ill. Const. .....30, 36

## CASES CITED.

Adamson v. California, 332 U.S. 46 ..... 29

Adler v. Board of Education, 342 U.S. 485 .....31, 36

Anti-Fascist Committee v. McGrath, 341 U.S. 123 ....34, 36

Barsky v. Board of Regents, 347 U.S. 442 .....3, 22, 23

Board of Education v. Barnette, 319 U.S. 624 ..... 30

Burdick v. United States, 236 U.S. 79 ..... 30

Chicago Housing Authority v. Blackman, 4 Ill. 2d—, 122 N.E. 2d 522 ..... 33

Clyde v. Gilchrist, 262 U.S. 94 ..... 38

Communications Assn. v. Douds, 339 U.S. 382 .....31, 36

Cummings v. Missouri, 4 Wall. 277 .....25, 35

Day, In re, 181 Ill. 73 ..... 18

Frost Trucking Co. v. R.R. Com., 271 U.S. 583 ..... 35

Garland, Ex parte, 4 Wall. 333 .....25, 35

Garner v. Los Angeles Board, 341 U.S. 716 ..3, 22, 31, 33, 36

Grae, Matter of, 282 N.Y. 428, 26 N.E. 2d 963 ..... 29

Hague v. C.I.O., 307 U.S. 496 ..... 29

Hamilton v. Regents, 293 U.S. 245 .....3, 21, 22

Hebert v. Louisiana, 272 U.S. 312 ..... 26

PAGE

Holland, In re, 377 Ill. 346 ..... 29

Jordan v. DeGeorge, 341 U.S. 223 ..... 20, 25

Levy, Application of, 214 F. 2d 331 (certiorari granted Nov. 22, 1954) ..... 3, 22, 37

Louisville & Nashville R. Co. v. Higdon, 234 U.S. 592 18

Lovell v. Griffin, 303 U.S. 444 ..... 29

McCollum v. Board of Education, 333 U.S. 203 ..3, 20, 21, 22

McCullough v. Maryland, 4 Wheat. 316 ..... 39

Murra, Application of, 178 F. 2d 670 ..... 32

Near v. Minnesota, 283 U.S. 697 ..... 29

Olmstead v. United States, 277 U.S. 438 ..... 40

People v. Peoples Stock Yards Bank, 344 Ill. 462 ..... 18

Steinbugler, Application of, 297 N.Y. 713, 77 N.E. 2d 16 ..... 36

Summers, In re, 325 U.S. 561 ..... 3, 19, 22, 36

Thornhill v. Alabama, 310 U.S. 88 ..... 29

United States v. Rumely, 345 U.S. 41 ..... 30

Watts v. Indiana, 338 U.S. 49 ..... 30

Wheeling Steel Corp. v. Glander, 337 U.S. 562 ..... 35

Whitney v. California, 274 U.S. 357 ..... 22

Wieman v. Updegraff, 344 U.S. 183 .....3, 22, 25, 33, 36

Winters v. New York, 333 U.S. 507 ..... 26, 30

Wolf v. Colorado, 338 U.S. 25 ..... 29

Young, Ex parte, 209 U.S. 123 ..... 30

Youngstown Co. v. Sawyer, 343 U.S. 579 ..... 30

PAGE

## STATUTES CITED.

Judiciary Code
28 U.S.C. Sec. 1257(2) ..... 3, 21, 22
28 U.S.C. Sec. 1257(3) ..... 3, 22
28 U.S.C. Sec. 2103 ..... 3, 22
Ill. Rev. Stat. 1951, chap. 13, par. 4 ..... 4, 21
Ill. Rev. Stat. 1953, chap. 110, par. 259.39 ..... 20
Ill. Rev. Stat. 1951, chap. 110, par. 259.58 (Ill. Supreme Court Rule 58) ..... 4, 9, 19

## TEXTS CITED.**

Catholic Encyclopedia, ed. 1912, Vol. 14 ..... 30
Encyclopedia Brittanica, 14th ed., Vol. 21 ..... 30
Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) ..... 35
Story on the Constitution, 5th ed. 1891 ..... 30

** Various law reviews and other publications are cited below in notes 2, 11, 25, 29, 33, 34 and 35.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

---

## NO.

---

*In re* GEORGE ANASTAPLO,

*Appellant*

---

On Appeal from The Supreme Court of Illinois

---

## JURISDICTIONAL STATEMENT.

---

Appellant, George Anastaplo, appeals from the judgment of the Supreme Court of Illinois, entered in the above-entitled case on September 23, 1954, denying him admission to the practice of law in the State of Illinois, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINION BELOW.

The Committee on Character and Fitness for the First Appellate Court District of Illinois (Committee) announced its decision with respect to appellant in a letter to him of June 5, 1951 (R. 74) but issued no statement of any kind until April 19, 1954, when the Committee filed a brief (styled a "Report") with the Supreme Court of Illinois (the court below) in response to appellant's brief[1] which had been submitted to that court September 27, 1953. This Committee Report is included in the Record (R. 350) as is a separate brief (styled "Suggestions") by a member of the Committee, Mr. Stephen Love, filed in the court below January 14, 1954 (R. 107).[2]

The opinion of the court below, entered September 23, 1954, is reported at 3 Ill. 2d 471, 121 N.E. 2d 826 and is printed in the Appendix to this Statement.

## JURISDICTION.

The judgment of the court below, now sought to be reviewed on appeal and reversed, was entered on September

---

[1] Appellant, in his brief and argument filed with the court below (hereinafter referred to as "brief below"), has analyzed in some detail the Record and has examined at length many of the problems referred to in this Jurisdictional Statement. Copies of that brief and of appellant's reply brief below are being submitted as exhibits with this Jurisdictional Statement (and have been added by the Clerk of the Supreme Court of Illinois to the certified record in this matter).

Extra copies of all Record documents and transcripts cited in this Statement are also being provided at this time.

[2] Reference is here made to London, "Heresy and the Illinois Bar: The Application of George Anastaplo for Admission," 12 Lawyers Guild Review 163 (1952), where there is available a substantial part of the Record in an easily readable form.

23, 1954,[3] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2), since the validity of the appropriate state statutes regulating admission to the bar has been challenged unsuccessfully on the ground of their repugnancy to the Federal Constitution. This Court has exercised jurisdiction in other cases touching upon similar problems. *Barsky* v. *Board of Regents*, 347 U.S. 442; *Wieman* v. *Updegraff*, 344 U.S. 183; *McCollum* v. *Board of Education*, 333 U.S. 203, 206; *Hamilton* v. *Regents*, 293 U.S. 245, 257-8. Notice of appeal was filed in the Supreme Court of Illinois December 15, 1954.

A writ of certiorari is alternatively petitioned for under 28 U.S.C. §1257(3) and §2103 (if an appeal should have been improvidently taken), a title, right, privilege or immunity having been specially set up or claimed under the Constitution. This Court has recently granted certiorari in cases involving admission to the bar: *In re Summers*, 325 U.S. 561 (1945); *Application of Levy*, 214 F. 2d 331 (C.A. 5th, 1954) (certiorari granted, Nov. 22, 1954, 23 Law Week 3142). See also, *Garner* v. *Los Angeles Board*, 341 U.S. 716.

---

[3] The action of the court below is the final judgment from which this appeal is taken. Under the rules of the Committee, appellant is entitled to three rehearings, at intervals of at least six months. Rule 12, Rules of Procedure of the Committee on Character and Fitness. But he cannot be expected to exhaust his right to such rehearings, a requirement that would be particularly onerous since appellant has himself thus far financed this litigation and cannot be expected to continue the process indefinitely. The fundamental differences here between appellant, on the one hand, and the court below and its committee, on the other, are not such to be resolved judicially by any hearing but that provided by this Court. The arbitrariness of the committee's conduct thus far, as well as its refusal to provide appellant in good time the rationale for its actions, emphasizes this last point. (See brief below, pp. 3, 24, 44; R. 75-80)

## STATUTES INVOLVED.

The appropriate parts of the statutes involved are as follows:

Rule 58, Section IX, Rules of Practice and Procedure of the Supreme Court of Illinois; Ill. Rev. Stat. 1951, chap. 110, par. 259.58, IX.

1. At the November term in each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court Districts of this State, consisting of not less than three members of the bar. . . .

2. Before admission to the bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the bar.

3. If the Committee is of the opinion that the applicant is of approved character and moral fitness, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

Ill. Rev. Stat. 1951, chap. 13, par. 4.

Every person admitted to practice as an attorney and counsellor at law shall, before his name is entered upon the roll to be kept as hereinafter provided, take and subscribe to an oath, substantially in the following form:

I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney and counsellor at law to the best of my ability.

## QUESTIONS PRESENTED.

There is ample and uncontradicted evidence showing that appellant's character, general fitness and citizenship qualify him for the practice of law. Nevertheless, the State of Illinois has denied him admission to the bar primarily because of his legitimate opinions about the problem of rightful rebellion, the Declaration of Independence and other matters. These were the opinions and problems to which the introductory and major parts of appellant's examinations before the character committee were devoted. An attempt is now being made, however, to justify the denial of a license to appellant on the ground of his principled refusal to answer inquiries into his political affiliations and newspaper subscriptions, even though no claim has ever been made that there is any reason to believe that the answers to these inquiries would in any way affect appellant's eligibility for admission to the bar. It is clear in the Record, moreover, that appellant would now be a member of the Illinois bar of four years standing but for his defense of the principles of the Declaration of Independence, a defense to which the character committee responded by asking questions about appellant's affiliations.

1. Are the statutes regulating bar admission which have been construed to authorize appellant's exclusion from the bar so vague, arbitrary and indefinite and their meaning so uncertain that they are unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment?

2. Furthermore, was appellant, either because of the manner in which these statutes were interpreted and applied or because of the actions and rulings of the court below and its committee, punished for the expression of his legitimate opinions and thereby limited in the free

exercise of speech, deprived of his liberty and property without due process of law and denied the equal protection of the laws in violation of the First and Fourteenth Amendments?

3. The court below rests its denial of appellant's constitutional rights on the proposition that an applicant for admission to the practice of law waives his constitutional rights of free speech (and perhaps every other right) against whatever may be considered "relevant inquiry." Are the validity and applicability of this proposition here so questionable as to render unconstitutional under the First and Fourteenth Amendments both any statute which is construed to be based on such a premise and any action which proceeds from such an assumption?

4. Among the inquiries evidently regarded as "relevant" at one time or another in this matter were those into appellant's possible affiliations with the Communist Party, with the Ku Klux Klan, with Attorney General's "list" organizations and with all organizations generally, as well as inquiries into appellant's possible subscriptions to *The Daily Worker* and to The Chicago *Tribune*. Were these inquiries relevant and reasonably adapted to a consideration of appellant's character, fitness and ability to take the oath of lawyer and consistent with the guarantees, under the First and Fourteenth Amendments, of freedom of speech, of the press and of due process of law?[4]

---

[4] The following objections to certain inquiries made of appellant which were not answered by appellant are also noted:

(a) Inquiries were made about past membership in the American Youth for Democracy and in the Ku Klux Klan. Are such inquiries, as well as those about present membership in various organizations when such membership had not theretofore been forbidden for members of the Illinois bar, permissible under the **ex post facto** clause in Article I, Section 10 of the Constitution of the United States?

(b) Various inquiries were justified, by both the court below

Appellant's views as to what are relevant and permissible inquiries are shared neither by the court below nor by its committee (except for certain inquiries which are now implicitly repudiated by the court below). Nevertheless, appellant cannot, in good conscience, submit to such inquiries even should the making of these inquiries into affiliations be deemed permissible under the Constitution. He has referred to eminent Americans of unquestioned character and good citizenship who have supported positions similar to his. His refusal is presented as a form of protest against such inquiries and proceedings and against the test-oath-like nature of the situation with which he has been confronted.

5. Is such a protest or refusal, especially when appellant has otherwise sustained the burden of proof as to his character, fitness and good citizenship and when the sincerity of his position is not challenged, protected by the First and Fourteenth Amendment as an exercise of the right to freedom of speech for which no penalty may be exacted by a State?

---

and its committee, not on the basis of any evidence introduced in this or any other Illinois bar admission proceeding but on the basis of Attorney General's "list" designations and of popular conceptions about certain organizations. Is such a procedure permissible under the prohibition of bills of attainder in Article I, Section 10 of the Constitution and can it conform to the necessity for establishing **scienter** on the part of those to whom such inquiries are directed?

(c) Various inquiries put by the character committee, with respect to newspaper subscriptions and to membership in all organizations that appellant may have belonged to, seem to have been repudiated by the court below and perhaps even by its committee after appellant had prejudiced himself by refusing to answer such inquiries. Does the presence of such inquiries, as well as those described in (a) and (b), cast doubt upon the validity of the action taken against appellant's application for admission to the bar and thereby call for a reversal of the action taken against appellant or at least for a very careful evaluation of that action?

6. Even should appellant's protest against and refusal to answer certain inquiries be without constitutional protection under the First Amendment, are his character, fitness and citizenship so obviously satisfactory, and the derogatory inferences (if any at all) to be drawn from a refusal to answer so limited and ambiguous, that it would be so highly unreasonable to exclude him in these circumstances from the practice of law as to violate the Due Process Clause of the Fourteenth Amendment?

7. Aside from the effect of other constitutional limitations upon state action, does this Court have the power to examine, for their wisdom as well as their reasonableness, the methods employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant qualified to practice both in his state and before this Court? If such power exists, should this Court exercise it in this instance to provide for the admission of appellant to the Illinois bar?

## STATEMENT OF THE CASE.

### 1. Chronology of events.

Appellant, having passed the Illinois bar examination, filed with the character committee (sitting in Chicago as commissioners of the Supreme Court of Illinois) an application for admission to practice law in Illinois, together with affidavits as to his good moral character and general fitness to practice law, as required by Section IX of Rule

58 of the Supreme Court of Illinois.[5] (Ill. Rev. Stat. 1951, chap. 110, par. 259.58) Subsequently, and as further ordained by the rule, he appeared (Nov. 10, 1950) for what has been termed "a routine hearing before a two-member section of the Committee" (R. 110) for examination into his moral character and good citizenship. (R. 15-21) His answers to questions put at this first hearing were such that appellant's induction into the bar, tentatively scheduled for November 29, 1950, was not permitted. (R. 4, 22) Instead, a second appearance before the full committee was deemed necessary and this was held January 5, 1951. (R. 22, 26-70) Ultimately, on June 5, 1951, appellant was sent the following letter from the Committee Secretary (R. 74),[6]

> The Committee on Character and Fitness of applicants for admission to the bar for the First Appellate Court District of Illinois has carefully considered the

[5] R. 5-14. An applicant for admission to the Illinois bar is required to file with the committee a verified questionnaire, and affidavits of at least three persons personally acquainted with him and residing in the same county certifying that the applicant is of good moral character and setting forth in detail the facts upon which such statement is based. He must also supply the committee with the names of five persons who have known him for at least five years; and in Cook County he must furnish, in addition, affidavits as to his character and fitness by three lawyers practicing in Cook County.

The affidavits and statements of these eleven attorneys and acquaintances are found in the Record at pages 10-14 and 8 (identification of character references). In addition, the committee sent an Investigator to appellant's home town (Carterville, Illinois, 2900 population), who evidently submitted with respect to appellant a favorable report which has never been incorporated in the Record available to appellant. References to this report may be found in the Record (pp. 83, 110-111 and 112), in the brief below (pp. 11-12, 26-27, 105 and 106) and in the Reply Brief below (p. 4, n1).

[6] The committee has since reported (in May 1953 and in April 1954) that the "position of the committee [with respect to appellant's certification for admission to the bar] remains unchanged." R. 84, 360. **Cf.** App., p. 42, **infra** (" . . . the committee has continued to refuse him a certificate . . .").

> proofs submitted by you and the evidence before the Committee in connection with your application for admission to the bar of Illinois. I am directed by the Committee to advise you that you have failed to prove that you possess such qualifications as to character and general fitness as in the opinion of the Committee would justify your admission to the bar of Illinois.

Appellant was not able, however, to secure any further information from the committee about the decision or its basis until six months after he had initiated, before the court below in September 1953, an action to review the committee's conduct and judgment. (R. 75-80) At this time, April 19, 1954 (almost three years after the committee decision), the committee filed a brief or report with the court below. (R. 350) That court entered its judgment denying appellant's petition on September 23, 1954. (App. p. 41, *infra;* 3 Ill. 2d 471, 121 N.E. 2d 826)

**2. Matters discussed and issues framed during appellant's examinations.**

The court below reports the following sequence of developments in the examination of appellant at his two hearings before the committee:

> . . . [T]he crux of the controversy is centered upon petitioner's refusal to answer as to whether he was a member of the Communist Party or of any of the subversive organizations on the list compiled by the United States Department of Justice. When first asked if he was a member of the Communist Party petitioner responded that the question was an inquiry into his political beliefs and an "illegitimate question." Similar responses to similar questions appear in other portions of the record of petitioner's examination and at no time did he answer the question. (App., p. 42-43, *infra*)

According to the court's view of the facts, as is indicated here and as will be seen below, these questions about affiliations were asked (for some unexplained reason) at the beginning of the first hearing and, when they went un-

answered, became the basis for further inquiry. Thus, the court below goes on to say,

> Predicated upon these refusals, the committee, on the basis of their opinion that a member of the Communist Party, because of such membership, could not in good faith take* the oath of lawyer to support the constitution of the United States and the constitution of the State of Illinois, then directed questions to petitioner designed to elicit his views in what the committee felt were pertinent areas of inquiry. Briefly summarized, as the result of the committee's questioning, petitioner expressed his opinion that a member of the Communist Party, otherwise qualified, should be admitted to the practice of law and that he could see nothing contradictory or incompatible between adherence to the tenets of that party and the taking of the oath to support the constitutions. Likewise, at this time, he expressed his belief in the doctrine of revolution and the overthrow of government by force of arms, saying that he would embrace such doctrine if he could not agree with the existing government, or found it unsatisfactory, and felt that force of arms was the only means to attain the end desired. (App., p. 43, *infra*)

(It should be noted, in passing, that a more adequate summary of his views on the "doctrine of revolution" is provided by appellant, both during his examination (R. 34) and in his Reply Brief (p. 6), where he refers to The Declaration of Independence. *Cf.* R. 63-64, 66-67.)

Many of appellant's constitutional challenges to the judgment in this matter do not depend on a view of the facts other than those accepted by the court below. But these challenges are strengthened, and others are made possible, when it is seen that the sequence of developments reported by the court below is clearly mistaken. Yet, there is no problem of conflicting testimony here, no question on the face of the record as to what the order of events is. It is clear in this case, once the facts are grasped, what has happened and why—and perhaps even why the court

---

* For an alternative reading, see note, p. i, **supra**, and p. 43, **infra**.

below has been provided a confused view of the facts by its committee of commissioners who seem unwilling to accept what they have done.

It is true, as the court below finds, that appellant refused on principle, on several occasions, to answer committee inquiries as to whether he was a member of the Communist Party or of any Attorney General's "list" organizations. (R. 18-20, 39-41, 52-54) The court below neglects to mention, however, that appellant also refused to answer specific inquiries as to whether he was a member of the Ku Klux Klan and as to whether he had ever subscribed to *The Daily Worker* or to The Chicago *Tribune* (R. 54-55, 58-59).[7] Nor did the court below indicate that before he had been put any inquiries as to possible Communist affiliations, appellant had refused to comply with the demand of a committee member to "give me all the organizations you are affiliated with or are a member of". (R. 19, 20; see, also, R. 39-40)

The court below refers to the fact that appellant was questioned about his opinions on the right of revolution (a line of inquiry leading to his reliance upon The Declaration of Independence) (R. 16-18, 31-35, 35-39, 51-52, 62-64, 67) and about his opinions on the qualifications of Communist Party members to practice law (R. 15, 41-45, 49-50). That court is clearly in error, however, in explaining that these inquiries as to appellant's opinions were "predicated upon" his refusal to answer questions as to Communist affiliations (App., p. 43, *infra*). Exactly the reverse is true, as a reading of the first few pages of the transcript of the first hearing (November 10, 1950) will indicate (R. 15-20).[8] Furthermore, appellant pointed out

[7] The only exception to these refusals was appellant's answer to whether he was then a subscriber to **The Daily Worker** (R. 54-55).

[8] Appellant prepared for the court below a chart on which there is set forth the sequence of questioning on various subjects and the amount of time devoted to each of the subjects (R. 105-6).

the correct sequence of questions, and the significance of that sequence, at least seven times in his brief below,[9] three times in his reply brief below,[10] and throughout his oral argument in the court below.

It was repeatedly stressed, during hearings, briefs and arguments, that the first inquiries as to affiliations came only after and only because questions as to appellant's opinions had elicited answers (with respect to the eligibility of Communists to practice law and to the problem of revolution) that moved the Committee to ask questions about affiliations and subscriptions (R. 15-20). Similarly, before the full committee (January 5, 1951—R. 26), the problem of rightful rebellion was thoroughly explored before it was evidently deemed necessary and appropriate to turn again to the question of appellant's possible affiliations (R. 39, 52) and, for the first time, to his newspaper subscriptions (R. 54-56).

It should be further noted that the Committee was *not*, in November 1950 (nor at any time since, so far as is known, except in appellant's matter), asking any bar applicants whether they were members of the Communist Party (R. 110, 112). It *was* asking, on a hit-or-miss basis which seems to have depended on the whim of particular committee members, what applicants thought of the eligibility of Communists to practice law.[11] And it was known

---

[9] Brief below, at pages 9, 28, 30-31, 35, 60, 80 and 97.

[10] Reply brief below, at pages 3, 5, 6 (n2).

[11] On what was happening in Chicago in November 1950, see brief below, pages 29-30, 29 n1, 97, as well as appellant's remarks before the committee (remarks which have never been challenged) (R. 57-62). Also, see Brown and Fassett, "Loyalty Tests for Admission to the Bar," 20 Univ. Chi. L. Rev. 480, 494 (1953).

The following summer (1951), after appellant's second hearing before the committee, one of the stock introductory "test" questions for appellant's classmates was, instead of "Do you believe members of the Communist Party are eligible to practice law?", "Do you agree with the ideas of George Anastaplo?" Brief below, p. 77. There is no record of a "wrong" answer having been received to this inquiry.

to appellant and to other applicants at the time that only a "wrong" answer to this inquiry led to further inquiry (R. 57-62)—in the case of appellant, his "wrong" answer induced the committee to ask questions, first, about the right of revolution and, subsequently, about his possible affiliations and newspaper subscriptions (R. 15-20, 54-55).

The version of the facts accepted by the court below, unlike that which we have just set forth, cannot account for the fact that questions as to affiliations and subscriptions were put to appellant and to no other applicant. Neither the court below nor its committee has been willing to point to anything in the record that would explain why such questions were asked. It should be noted, in this connection, that no allegation has been made by anyone—even on information and belief—that appellant is or ever has been a member of either the Communist Party or the Ku Klux Klan, a member of any Attorney General's "list" organization, a subscriber to *The Daily Worker* or to The Chicago *Tribune*. We think it consistent with appellant's refusal, on principle, to answer inquiries as to these affiliations and subscriptions, however, to point out that there is no suggestion anywhere in the Record of any such circumstance in the case, no evidence to that effect and no finding to that effect.

The silence of the Illinois authorities on these matters—even if it is assumed that such matters are relevant and proper to the purposes of the proceedings—is made much more significant by the long lapse of time which has occurred, and by the silence of the committee about the report of their Investigator and the refusal to make it public or available to appellant (*supra*, p. 9, n. 5). It seems clear that no one connected with the proceeding is ready to allege, even on information and belief, that an affirmative reply to any of the questions about affiliations or subscriptions would be or ever would have been true. Such

an allegation, at least, or some suggestion to that effect, seems necessary to put the facts in issue, particularly in a context where there is a strong affirmative record as to appellant's qualifications and where his silence has been stated to be on principle and as a form of protest against the kind of hearing and inquiries indulged in by the character committee. The lack of such an allegation and the evident inability of all concerned to refer to any evidence which even they might consider adverse to appellant's eligibility not only emphasizes that the court below and its committee had no justification for asking questions about affiliations; but it also indicates the extent to which the committee has been permitted to penalize appellant for the opinions he has expressed.

While the opinion of the court below mistakenly treats Communist Party membership as an issue in this controversy, its erroneous conception of the part played by the discussion of the right of revolution leaves it open to the committee, in case of further proceedings, to refuse appellant admission except on condition that he express his disagreement with the Declaration of Independence. His expressions of opinion on this point are clearly an issue on the record, so much so that it is apparent that but for his expression of opinions about the problem of rightful rebellion appellant would now be a member of the Illinois bar of four years standing. On the other hand, membership in the Communist Party is not an issue, but only the effect of a refusal to answer questions about such membership (and other similar questions) when there is no allegation or evidence of membership, when the questions occur only after long periods of badgering about philosophical and political views, particularly views about the right of revolution, and when silence is couched in the form of a refusal to submit to something deemed by appellant to be in the nature of a test oath and to be improper and unconstitutional inquiry.

The court below has chosen, for the most part, to ignore everything but the inquiries as to affiliations and devotes itself to considering the "relevancy" of inquiries about Communist affiliations, but only in abstract terms unrelated to this particular applicant. To justify its limited view of the problem, the court below insists that there is

> nothing in the record to substantiate petitioner's conclusion that the committee was hostile to him or that its decision was motivated by personal opinions differing from his own.[12]

It can make this claim only by ignoring the record, accepting despite all efforts of appellant, a garbled version of the sequence of developments, and by discounting altogether the report of a committee member who said (without subsequent challenge from his erstwhile colleagues) that appellant

> is probably the first applicant in the history of the Committee whose certificate was denied to him on the basis of his opinions rather than on the basis of any overt acts of misconduct.[13]

The court below insists, moreover, upon treating this as a matter in which, for all practical purposes, only relevant inquiries as to Communist affiliations were asked. It gives little consideration to the reasons appellant has given for his refusal to answer such questions, reasons questioning not only the relevancy of such questions but also challenging their foundation in the Record, their applicability to appellant and their validity under the state and federal constitutions. No consideration has been given to the evidentiary significance of a refusal to answer what might

---

[12] App., p. 44, **infra.** On the question of hostility, **cf.** R. 118.

[13] R. 111. See also R. 112, 113. Mr. Love is able to insist upon this conclusion even though he adopts the version of the sequence of inquiries, as well as the standards and views with respect to the eligibility of Communist Party members to practice law, advanced by the court below. R. 114-115, 118.

even be a "relevant" inquiry when that refusal is found in such a context as this and for the reasons given by appellant. Nothing is said by the court below of appellant's claim that his silence was justified as a form of protest against the kind of hearing conducted by the committee. Yet, nowhere is the sincerity or plausibility of appellant's position questioned nor is there an indication of anything derogatory in his military, scholastic or general civilian record. Thus, the court below does not choose to challenge (or more than mention) the burden of proof as to appellant's character, general fitness and good citizenship which was sustained by various affidavits (R. 10-14), by the data furnished in a background questionnaire (R. 5-9), by a presumably favorable report of a committee Investigator who visited appellant's home town on at least two occasions (*supra*, p. 9, n. 5), by the testimony of a member of the faculty of appellant's law school who appeared upon his own initiative as a witness before the committee (R. 66), by the testimony and conduct of appellant before the committee and even by the observation of still another committee member that

> Your record, which I have just skimmed through, indicates that your teachers had the greatest regard for your Americanism and moral principles, and I am also aware of the fact that you have served in the Air Force . . . In other words, your references and your record on its face appear to be excellent. (R. 20)

The court below, ignoring the qualifications of appellant and concerning itself only with the abstract problem of whether a member of the Communist Party should be permitted to practice law, sustained and reaffirmed the committee's denial of appellant's application for admission to the Illinois bar. It is from this decision and denial that an appeal is taken.

**3. How the federal questions are presented.**

Several of the questions we have presented (those numbered 3 and 4, as well as certain aspects of those numbered 2, 5 and 6) were explicitly considered by the court below, making it unnecessary to show that those federal questions were properly raised. *Louisville & Nashville R. Co.* v. *Higdon,* 234 U.S. 592, 598. All of the questions presented, including those explicitly considered by the court below, were raised in the form appropriate for the court below in the brief filed by appellant with that court.[14] Not only does the court below claim original jurisdiction in bar admission matters,[15] thereby making it appropriate to raise before it federal constitutional questions, but it was also implied by that court that the constitutional objections appellant raised in his brief were properly presented for consideration by the court below and were in

---

[14] A consideration of pages 14-20, brief below, where both appellant's points in the court below and the authorities relied upon to support those points emphasize federal constitutional problems, makes it clear that all the federal questions presented have been properly raised and preserved.

Thus, for example, Question No. 5 (relating to whether a refusal to answer inquiries into affiliations may be considered a "protest" protected under the First Amendment) is included in Points VIII and X (pp. 17-18, brief below) where it is suggested that "[e]ven should the Committee have the authority and the power to make inquiries about an applicant's organizational affiliations, the failure to answer such inquiries for the reasons given is, in this context, no adverse reflection upon the character, fitness or good citizenship of the Applicant" and (in the latter point) "any reliance by the Committee in making its decision upon the Applicant's refusal to answer such questions [is] unconstitutional as exercises of state power that unjustifiably infringe upon the freedom of speech guaranteed by the First and Fourteenth Amendments" (supplemented by the discussion at pages 59, 65-66, 81-84, 90, and at R. 55-62). A similar foundation could be spelled out for each of the questions presented. (See note 21, **infra**)

[15] **People v. Peoples Stock Yards Bank,** 344 Ill. 462; **In re Day,** 181 Ill. 73.

fact considered to some extent.[16] The concern with federal constitutional law almost exclusively throughout the opinion indicates clearly that the decision of the court below (the highest court of the state of Illinois) does not rest upon any state ground which independently and adequately supports the decision.

It may well be that the most important questions presented here could be raised, if they stood alone, only in a petition for a writ of certiorari. But there seem to be others, of some importance, that can be brought here on appeal and with them those that could not serve as a basis for an appeal of right. One federal question, upon which an appeal of right is based, was set forth at page 100 of appellant's brief before the court below where it was said,

> We submit, therefore, that Rule 58 (Section IX) of the Illinois Supreme Court rules (which rule is set forth above . . . in the Appendix to the Brief), as it has been interpreted and manipulated by the Committee on Character and Fitness for the First Appellate Court District of Illinois, should be considered "void for vagueness" and that the action of the Committee in this case should be ruled an unconstitutional deprivation of due process of law.

Thus, the constitutionality of part of Illinois Supreme Court Rule 58 (Ill. Rev. Stat. 1951, chap. 110, par. 259.58)

---

[16] " . . . [I]t is our opinion, in the light of petitioner's claims that the committee abused its discretion and that certain of his constitutional rights were infringed upon, there exist circumstances which should cause us to set the matter down for argument and opinion. (**In re Summers,** 325 U.S. 561 . .) . ." App. p. 42, **infra.**

"We are next met, however, by petitioner's contention that inquiries about his 'political affiliations and organizational memberships' are unconstitutional, as being in derogation of the right to free speech guaranteed under the first and fourteenth amendments to the constitution of the United States. Though petitioner argues forcefully and at great length . . ." App., p. 50, **infra.** The reference by the court below to "great length" is undoubtedly to appellant's brief below.

is there challenged, the appropriate portion of that statute having been set forth in the appendix to the brief as required by Illinois Supreme Court Rule 39 whenever the constitutionality of a statute is being questioned. (Ill. Rev. Stat. 1953, chap. 110, par. 259.39) It is apparent from the context of this passage, where *Jordan* v. *DeGeorge*, 341 U.S. 223, 231 (1951) is referred to as instructive on what satisfies the due process clause of the Fourteenth Amendment in a matter where certain "character" standards are employed, that a federal constitutional challenge is being made.[17] Furthermore, the references throughout the Argument relating to this point below are to

> the equal protection of the laws and to due process of law which are guaranteed by the Fourteenth Amendment to the Constitution of the United States and by comparable provisions in the Constitution of Illinois. (Brief below, pp. 18-19, 90)

Although the court below does not explicitly deal with this constitutional objection, it is apparent that the decision of this state court necessarily sustained the validity of the state statute against attacks on federal grounds. The stage at which constitutionality was challenged was the same as that at which were raised several of the federal questions upon which the court below did explicitly pass. There is no doubt that the court below had in mind these constitutional issues, that it passed on them and that it rejected appellant's challenge. *McCollum* v. *Board of Education*, 333 U.S. 203, 207. Nor is there any doubt that there evidently was an insistence upon federal rights throughout the case, even while appellant was being questioned by committee members (*e.g.*, R. 46-7, 59).

---

[17] This particular constitutional challenge is considered in more detail at pages 24-6, **supra.** Another federal question upon which an appeal of right may be based is included in Question No. 3.

The only problem remaining then, to qualify this case for acceptance as an appeal under 28 U.S.C. §1257(2) (aside from the problem of the substantiality and importance of the questions raised, which will be considered below), is whether the rules of the Illinois Court can be considered a "statute." It would seem that they should be, as they are enactments,

> legislative in character to which the state gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power.[18]

We recognize, however, that it is not absolutely certain that an appeal lies in this matter: the term, "statute" for instance, may not be deemed to apply to rules of court, even when the rules here are of a permanent nature, incorporated into the statutes of the state and set out as general rules for both governmental agencies and individuals to follow. And the enactment which is undoubtedly a statute, setting forth the oath provided by the state legislature, may be considered of too subsidiary a nature in this matter upon which to base an appeal. But see *McCollum* v. *Board of Education*, 333 U.S. 203, 206.

There is no doubt, however, that substantial federal questions, claiming rights, privileges and immunities under the Federal Constitution were opportunely raised as a basis for securing a writ of certiorari under 28 U.S.C. §§1257(3), 2103. In fact, the court below was obliged to deal with some of these constitutional questions through-

---

[18] **Hamilton v. Regents,** 293 U.S. 245, 258. It should be noted that both the court below and evidently the committee did interpret and apply in this manner an enactment of the Illinois legislature prescribing the oath to be taken by the lawyer, Ill. Rev. Stat. 1951, chap. 13, par. 4. The constitutionality of that statute, as interpreted, is being challenged (Questions No. 1, 3) on the basis of the First and Fourteenth Amendments and may also provide a foundation for an appeal of right.

out its opinion, clearly bringing this matter within the certiorari jurisdiction of this Court. *Whitney* v. *California,* 274 U.S. 357, 360-1. More will be said about these questions when their substantiality is considered. But should an appeal be permitted, it is requested that the questions that could be raised only on certiorari (if there were no grounds for an appeal) be considered along with the challenges to the constitutionality of the "statute."[19]

## THE QUESTIONS ARE SUBSTANTIAL.

### Introduction: the two cases.

We have already noticed several of the more obvious errors in the opinion of the court below: the sequence of

---

[19] The cases discussed in this footnote seem to support the proposition that jurisdiction is conferred upon this Court with respect to appellant's matter by 28 U.S.C. Secs. 1257(2) and 1257(3).

**Barsky v. Board of Regents,** 347 US. 442, like **Wieman v. Updegraff,** 344 U.S. 183, came before this Court on appeal, jurisdiction having been conferred by 28 U.S.C. Sec. 1257(2). And, as in the **Wieman** case, there was involved a claim that due process considerations under the Fourteenth Amendment cast doubt upon the validity of a statute which allegedly permitted political tests which deprived individuals of the right to work at their profession. **McCollum v. Board of Education,** 333 U.S. 203, and **Hamilton v. Regents,** 293 U.S. 245, indicate, among other things, that jurisdiction under what is now Sec. 1257(2) is appropriate even when the state "statute" involved is not cast in the usual form.

**In re Summers,** 325 U.S. 561, records this Court's ruling that a claim of a present right to admission to the bar of a state and a denial of that right is a controversy; and when that claim is made in a state court and a denial of that right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution. Thus, the **Summers** case, reinforced in this respect by **Application of Levy,** 214 F. 2d 331 (certiorari granted, Nov. 22, 1954) (involving admission to the federal bar), provides support for invoking the certiorari jurisdiction conferred upon this Court by 28 U.S.C. Sec. 1257(3) in a bar admission matter involving claims of various rights under the Constitution. **Garner v. Los Angeles Board,** 341 U.S. 716, indicates that challenges to loyalty oaths grounded upon the First Amendment, as well as upon the **ex post facto** and bill of attainder provisions of Art. I, Sec. 10 of the Constitution, may bring a case within the certiorari jurisdiction of this Court.

inquiries has been reversed (R. 15-20); appellant's views on the right of revolution are reported in a misleading fashion (with no reference to the unifying espousal of The Declaration of Independence) (R. 33-35); the questions about newspaper subscriptions (R. 54-55), about "all organizations" (R. 19-20), and about the Ku Klux Klan (R. 54, 58-59) are not even mentioned. In addition, there is the refusal to acknowledge some of appellant's most important arguments, those examining the evidentiary significance of appellant's silence and the historical significance of a refusal to subscribe to "test oaths". Finally, there is the court's neglect of the affirmative showing in the Record as to appellant's character, fitness and good citizenship.

If the court below and its committee had restricted themselves to the actual case, they would have had to consider the qualifications of an applicant (with an unchallenged record as to his good character, fitness and citizenship)[20] who was first questioned about his opinions; who then gave legitimate answers which thereupon excited the committee to ask about his affiliations (including to the Communist Party and to the Ku Klux Klan) and about his newspaper subscriptions (to *The Daily Worker* and to The Chicago *Tribune*); and who has advanced various constitutional and philosophical reasons for not answering inquiries into affiliations.

Rather than admit this case, the committee and court below have given the impression, without actually committing themselves explicitly to the position, that not only are the facts we have just reviewed absent from the record but that they had before them, instead, an applicant whose background was so suspicious and whose opinions on such sub-

[20] Thus, there is not even in the Record here anything remotely similar to the fact of conviction of a federal offense upon which turned the decision upholding state action in **Barsky v. Board of Regents, 347 U.S. 442.**

jects as the right of revolution were so dangerous and indefensible that without an expression by him as to his possible Communist affiliations no decision could be made as to his character, fitness and good citizenship. Nothing could be further from the truth: what has been said of the Committee (Reply brief below, p. 2) applies as well to the court below in this matter:

> The Committee does not contend that there is *any* evidence unfavorable to the Applicant in the Record. The Committee does not contend that the Applicant has committed any act, participated in any behavior or displayed any attitude that casts reflection upon either his character and fitness for the practice of law or upon his capacity to subscribe in good faith to the required constitutional oath of office. The Committee does not even contend, if its argument is read closely, that it has any real doubts about the character and moral fitness of the Applicant.

It is only by omitting or changing certain facts that the court below and its committee have been able to ignore what this case is all about. Merely to state the questions we have raised is to indicate both their substantiality and their importance. These questions are even more significant in the light of the problems avoided by the court below and by its committee through an arbitrary arrangement and treatment of the undisputed and undisputable facts in the case.

**1. Statutes void for vagueness; other due process considerations.** (See brief below, pp. 24-26, 86-88, 90-100, 101-112).[21] A challenge based on the Fourteenth Amendment has been lodged against "statutes" which are valid on their face but not as interpreted and applied in this

[21] Reference will be made after each of these subtitles to the appropriate places in appellant's brief before the court below where the relevant question (or some aspect of it) was raised and was discussed in some detail. Question 7, of course, presents special problems.

situation. (Brief below, pp. 99-100, 18-19) The court below and its committee have ignored the traditional "moral character" tone of terms such as "character and general fitness" and have also engrafted political tests upon the simple oath "to support the constitution." Thus, they have refused to employ words with that precision which they had come to assume in a legal context but have substituted an emphasis that rests upon vague and indefinite notions about political affiliations and suspected philosophical ideas and opinions. This departure from the established meaning of these terms, and from the accepted purpose of these committees, raises serious questions about due process of law. *Jordan* v. *DeGeorge*, 341 U.S. 223, 230-232. Especially is this so in circumstances where *ex post facto* and bill of attainder considerations may be appropriate. *Cf. Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277 (Brief below, pp. 51 n1, n2, 56, 88-90).

The desirability of correction in such a situation should be strengthened by the realization that minimum procedural safeguards will have to be established, sooner or later, in bar admission matters. Among these could well be the requirement that a character committee have at least the obligation and courage to set forth a charge against a particular applicant before embarking upon inquiries of the kind seen here. Certainly, there should be findings of fact upon which a decision to exclude is based. In this case, there is only a consideration, by court and committee, of the abstract (and, at most, tangential) question of the eligibility of a Communist to practice law. The absence from the Record of adverse evidence with respect to appellant's qualifications emphasizes an arbitrariness and lack of procedural due process that this Court would do well to provide against in future cases. *Cf. Wieman* v. *Updegraff*, 344 U.S. 183, 192.

In this connection, it is appropriate to point out that the approach of the character committee, sanctioned by the court below, so ignored the evidence in the Record and led to such misrepresentation of the basis of the committee's decision as to violate elementary notions of justice and fair play which are of constitutional stature. *Cf. Hebert* v. *Louisiana,* 272 U.S. 312, 316-317. These various due process defects are even more serious when they relate to proceedings that raise important free-speech problems under the First and Fourteenth Amendments. As was said by this Court in *Winters* v. *New York,* 333 U.S. 507, 509,

> . . . It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. . . .

**2. Free-Speech Problem—Part I: Penalization for the expression of legitimate opinions.** (See brief below, pp. 26-37, 38-43, 80-81). Appellant has been denied admission to the Illinois bar primarily because of his legitimate opinions about the right of revolution and the Declaration of Independence: if it had not been for the opinions elicited from him on this subject (R. 15), appellant would now be a member of the Illinois bar. It is significant that the committee cites as "evidence" in its Report no overt acts of appellant but simply his "views on three general areas of inquiry" (R. 356-359). The chart set forth at R. 105-106 not only describes the sequence of inquiries made of appellant but also indicates how much time was devoted to the various subjects discussed during appellant's appearances before the committee. Thus, the right of revolution took up one-third of the hearings, much more than any other subject.

Committee members seem, at times, to acknowledge that differences of opinion are behind the conflict between ap-

pellant and the committee (*e.g.*, R. 19, 52). Further evidence as to the source of the conflict is provided by the fact that, as distinct from questions occasionally asked of applicants about whether they thought members of the Communist Party eligible to practice law, no one else has been asked about his affiliations, so far as we know (R. 110, 112). This is to be expected, since the questions about affiliations were, in effect, a form of "punishment" for the opinions previously expressed by appellant. (Brief below, pp. 80-81) Thus, even the committee admits that it is of the opinion

> that these views of the applicant [on the subject of the right of revolution] increase the importance of his refusals to answer [questions about his affiliations] and make more necessary a complete answer by the applicant on the subject of membership in the Communist Party. (R. 364-365; *Cf.* App., pp. 43-44, *infra*).

That is to say, there was deemed to be something suspicious or derogatory about the opinions expressed by appellant, so much so that state action should be modified accordingly. This is an abridgement of the right to free speech under the First and Fourteenth Amendments for which neither the court below, nor its committee, has or can advance any justification in the circumstances of the case.[22]

**3. Free-Speech Problem—Part II: Consequences of a refusal to answer certain inquiries or to subscribe to test oaths.** (See, brief below, pp. 59-69, 69-78, 81-84, 90, 102-110) The court below devotes most of its opinion (App. pp. 44-51)

---

[22] It would have been frivolous, we suggest, for either the court below or its committee to advance any "clear and present danger test" justification for the infringement here of **appellant's** freedom of speech. (Brief below, pp. 83-84) The only clear and present (or even remote) danger in this matter is with respect to the equanimity of certain committee members who refused to concede that appellant should exercise his own judgment in matters of importance. (R. 15-18, 33, 38-39, 50-51, 64-65)

to an attempt to demonstrate the constitutional validity and relevancy of an inquiry into whether a bar applicant is a member of the Communist Party. Although we challenge this conclusion (*infra,* pp. 33-5), appellant's case does not necessarily rest upon a conclusion other than that of the court below. The important problem with respect to this point in this case starts where the court below stops. That is, the problem is not whether appellant described correctly inquiries into his affiliations as "improper" and "illegitimate" (*e.g.,* R. 19-20), but rather whether a refusal to answer such inquiries, on the present record, permits any inferences which would justify exclusion from the bar.

It is apparent on the record that appellant could have avoided his controversy with the committee simply by giving them at the outset the opinions they wanted (*e.g.,* 15-18). The opinion of the court below does not explain away this difficulty for a committee passing on character and fitness.[23] Nor does it deal with the related claim by appellant that his refusals constitute a protest against inquiries and proceedings of the nature indulged in by the committee.[24]

---

[23] This difficulty, inherent in an examination approach that can be easily circumvented by applicants who do not scrupulously (or foolishly?) defend what is evidently the "wrong" answer, indicates that the ineffectiveness of the methods employed by the committee is such as to warrant disavowal of such methods under the Fourteenth Amendment as highly unreasonable and totally inappropriate for the purposes said to be intended. (See R. 57-62; brief below, 80-81, 96-99)

[24] The validity of the protest does not depend on what the actual sequence of inquiries was in the hearings. That sequence does emphasize, however, what is otherwise obscured somewhat by the recent language of both the court below and its committee, that appellant is being penalized for the opinions he was asked to express by the character committee.

Nor is the validity of a protest vitiated by the fact that there might be other means of protest, such as answering satisfactorily (if one can) the questions of the committee and then "fighting

He further claims for such protest the protection of the First Amendment. Reinforcing these claims is a sentiment such as that expressed by this Court in *Thornhill* v. *Alabama*, 310 U.S. 88, 97,

> . . . The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U.S. 697, 713. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin*, 303 U.S. 444; *Hague* v. *C.I.O.*, 307 U.S. 496 . . .

An insistence by court and committee upon expurgatory oaths or answers, in a context such as this, is challenged as inimical to American institutions and principles.[25] The

---

from within the bar." Appellant has adopted an approach which seems to him both based on good precedent and most effective. He is reinforced in this evaluation by the realization that those within the bar, when they do express themselves on such matters, are taken far less seriously with respect to these issues than even appellant is.

[25] Appellant has pointed out (R. 40; brief below, p. 64) that the Fifth Amendment is not basic here. But had appellant relied primarily upon the non-incrimination provision in the Fifth Amendment (or in the privileges and immunities clause or in the Due Process Clause of the Fourteenth Amendment), rather than upon the First Amendment and other constitutional provisions, to justify his silence with respect to his affiliations, such silence should not have been more than a part of the evidence to be considered when evaluating his character and fitness (if even any evidence at all). **Cf In re Holland**, 377 Ill. 346; **Matter of Grae**, 282 N. Y. 428, 26 N.E. 2d 963. **Cf.** also **Adamson v. California**, 332 U.S. 46; **Wolf v. Colorado**, 338 U.S. 25. See Crosskey, "Constitutional Limitations on State Authority," 22 Univ. Chi. L. Rev. 1 (1954).

Thus, Dean Griswold, in an article on the Fifth Amendment (40

**legitimacy and respectability of such refusals as appellant's are evident to anyone familiar, for instance, with the traditional attitude toward "test oaths."[26] This Court, in *Board of Education* v. *Barnette*, 319 U.S. 624, has indicated, as did the dissenting opinion (319 U.S. at 663-4), that that attitude is not without foundation in constitutional law. And members of this Court have repeatedly voiced objections to the use of test oaths since the *Barnette* case.[27] *Cf.* Art. V, Sec. 25, Constitution of Illinois (exclusive oath provision); Art. VI, Constitution of the United States (religious test prohibition).**

---

A.B.A.J. 502, 504 (1954), quotes Mr. Justice McKenna in **Burdick v. United States,** 236 U.S. 79, at page 94, on the effect of a reliance upon the non-incrimination provision of this amendment, "If it be objected that . . . [Burdick's] . . . refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law." **(Cf.** 40 A.B.A.J. 935, where this passage is misinterpreted.) Furthermore, even though there is not here a criminal case, it would seem that distinctions between an accusatorial and an inquisitorial system would be appropriate. **Cf. Watts v. Indiana,** 338 U.S. 49, 54-55; also, on "notice", **Winters v. New York,** 333 U.S. 507, 510.

These considerations, in a situation where there is a "fishing expedition" into one's opinions, political theories and associations, suggest that First Amendment protection should be brought to bear. Such considerations are reinforced, furthermore, by a stubborn American tradition of testing by judicial review suspect claims of governmental power. **Cf. United States v. Rumely,** 345 U.S. 41 (1953); **Youngstown v. Sawyer,** 343 U.S. 579 (1952); **Ex parte Young,** 209 U.S. 123, 148 (1908).

[26] See brief below, pp. *66-69, 70-78*; **Story on the Constitution,** 5th ed. 1891, Sections 1847-49; **Encyclopedia Brittanica,** 14th ed., "Test Acts", Vol. 21, pp. *976-7*; **Catholic Encyclopedia,** ed. 1912, "Test Oath, Missouri," Vol. 14, pp. 538-39.

Character committee hearings only accentuate the objectionable features of test oaths, since the hearings are uncontrolled and formless, removed from public inspection and debate and very much subject to caprice and the whim of particular examiners. Brief below, **pp. 54, 78.**

[27] Even the committee evidently encountered difficulties assuring itself that questions about affiliations had been permissible in this matter. (R. 110)

Appellant's attitude toward "test oaths" has found expression in our time in the now familiar University of California controversy, where opposition to a test oath certainly implied nothing adverse about the character, fitness or good citizenship either of the regents who resisted its introduction or of the professors who refused to sign it. Thus, a protest such as appellant's has meaning partly because of the tradition and precedent upon which it is based. This protest becomes even more significant and justified when it is seen that the questions put to appellant were not a critical part of an inquiry into character and fitness. No other Illinois bar applicant, so far as is known, has been asked about his affiliations and the court below (since it does not acknowledge the relationship between the expression of appellant's opinions and the resulting questions about affiliations) cannot advance any reason why appellant should be treated to unique inquiries or why it should insist upon an answer to such inquiries.

This aspect of the matter suggests one of the points of distinction between this situation and that found in cases such as *Adler* v. *Board of Education*, 342 U.S. 485; *Communications Assn.* v. *Douds*, 339 U.S. 382; and *Garner* v. *Los Angeles Board*, 341 U.S. 716. For these cases relate to situations where the inquiries into affiliations were required by statute and not simply selected from among other possible methods by authorities evaluating the qualifications of school teachers, union officials, or public employees. Nor do these cases suggest that such a requirement can be insisted upon merely because an individual has expressed opinions with which a governmental agency takes issue. Because of the manner in which those cases arose and because of the statutory basis for the inquiries into affiliations, this Court may not have felt free to consider a refusal to answer certain inquiries as a protest.

In this instance, however, the statutory duty of the governmental agency—to pass upon appellant's character and fitness and good citizenship—is not necessarily interfered with by appellant's refusal to answer questions as to his affiliations.[28]

The court below has implicitly ruled that such refusal and silence are not a form of protest or of speech protected by the First and Fourteenth Amendments. It is therefore highly desirable—if this ruling is to be corrected and if future error is to be avoided—that this Court consider the evidentiary and constitutional significance of an apparently conscientious refusal by an individual, otherwise qualified, to answer inquiries into his affiliations, questions which might be relevant to some issues but not to the issues framed by the committee, found in the Record or defined by the appropriate statutes. For as matters now stand, appellant is being penalized for his opinions and for non-cooperation *per se*. The following observation by Professor Malcolm Sharp bears upon this aspect of the matter:[29]

> . . . As I understand it, the only objection to your record which the Committee can seriously make is based on what some of the Committee consider your uncooperative attitude in dealing with them. Again, as some of the Committee recognize, your attitude is not non-cooperative in any sense which would raise legitimate questions about your good citizenship. You are simply very serious, perhaps as some members of our own faculty think, too serious, in insisting on your own views about intellectual and political freedom. While members of the Committee may differ in their opinion of the position you have taken, it is hard to see how any of them, once they stand off and look at

---

[28] **Cf. Application of Murra,** 178 F. 2d 670, 674 (C.A. 7th, 1949).

[29] Letter to appellant, March 26, 1951; later published with Mr. Sharp's approval as part of a Comment in Anastaplo, **Some Rash Innovations and Speculations** (1951), copies of which comment are being provided this Court.

> the matter, can suppose that your refusal to agree with their views is simply non-cooperation. Your position is from anyone's point of view an expression of serious and courageous citizenship, and that I take it means good citizenship. If one is serious and courageous in developing and expressing his position on public issues, that is strong evidence of good citizenship, however much others may differ with the views expressed.

How seriously *should* one take his constitutional rights? Can a lawyer be relied upon to protect the rights of an unpopular client if he will not protect his own?

**4. Constitutionality of the inquiries into affiliations.** (See brief below, pp. 46-50, 50-58, 78-84, 84-90, 92-96) The only question the court below (and its committee) faced squarely was that of the eligibility of a Communist to practice law. Because of the present climate of opinion, this is one question asked by the committee for which some support evidently seemed available. It is apparent in the transcripts of the hearings, however, that appellant was prejudiced as well by refusals to answer many questions that the court below does not now attempt to justify and by the expression of opinions which no court (after there has been time for reflection) would want to point to as supporting exclusion from the bar.

The court below and its committee leave little doubt that they regard Communist Party membership as "totally incompatible" with loyalty to the Constitution.[30] (App. p.

[30] It seems likely, both from the opinion of the court below and the action of its committee, that not even the limitation with respect to **scienter** defined in **Wieman v. Updegraff,** 344 U.S. 183, may be accepted by the Illinois authorities in any meaningful sense. (See brief below, pp. 60-63, 86-88.) Compare **Garner v. Los Angeles Board,** 341 U.S. 716, 720. Compare also the decision of the court below in **Chicago Housing Authority v. Blackman,** 4 Ill. 2d —, 122 N.E. 2d 522. In the **Blackman** case, a loyalty oath disclaiming a tenant's affiliation "directly or indirectly with any communist organization or any communist front organization" called forth the ruling, "It is clear under the authority of the **Wieman** case the present requirement violates due process of law and is

49, *infra*) To the support of this conclusion the court below devotes most of its opinion. It seems to realize that this conclusion must be firmly established if the committee decision is to have any validity with respect to an applicant against whom there is only the "charge" of a failure to speak as to possible Communist affiliations. But the court below fails to add that such a conclusion can only be part of the case against appellant, for there still would remain the problem of evaluating the constitutional and evidentiary significance of a refusal to answer permissible inquiries where the applicant is otherwise qualified to practice law.

We have said that the treatment of the question of whether a Communist is qualified to practice is an abstract one, unrelated by the court below to this particular context or even to this kind of context. (See brief below, pp. 92-96)[31] Even so and since the committee's decision seems vulnerable on this point also, it is suggested that this

---

void." No reference was made in this opinion to appellant's case decided eight weeks before.

There is no doubt, in any event, that membership in the Communist Party is a liability in Illinois for one seeking admission to the bar regardless of what inquiries may be made of an avowed Communist as to his "knowledge of the purposes" of the Communist Party. This factor suggests the test oath nature of the proceedings conducted by the character committee and sanctioned by the court below in this matter.

[31] The reliance by the committee (and the endorsement by the court below of that reliance) upon the Attorney General's list of "subversive organizations" also seem inappropriate, not only because there exist doubts as to the validity of that list (**Anti-Fascist Committee v. McGrath**, 341 U.S. 123), but as well because this list has not been compiled for the purposes of bar admission committees.

It should be noted, in this connection, that if bar committees are restricted in the use of devices and methods that appeal to them because of the political climate, it does not mean that the bar will be unable to police itself for improper conduct on the part of particular attorneys. A realization of the capacity of the bar to supervise an attorney's conduct for particular acts of misconduct in his professional life makes even more suspect any claim by bar committees that they must insist upon admission requirements that emphasize political conformity.

Court now consider whether it should leave unexamined this conclusion by the court below as to the eligibility of a Communist to practice law, a conclusion which has overtones of the bill of attainder and *ex post facto* legislation, which ignores rulings of a century ago (*Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277) and which limits even more the constitutional rights of the avowed Communist to freedom of speech and due process of law under the First and Fourteenth Amendments.

The problem here, however, is not that of Communism. It is evident on the record that the critical problem relates not to the relevancy of inquiries about Communist affiliations but rather to the constitutionality of state action which infringes upon appellant's freedom to speak on various subjects, including the freedom to protest in the most effective and yet in an acceptable manner against certain inquiries into his political opinions, affiliations and associations. What has happened here emphasizes the importance of the First Amendment and the dangers inherent in devices such as inquiries into political opinions and tests oaths.

5. **"Unconstitutional conditions"**. (Brief below, pp. 21-24, 46-50) The court below rests its decision, both with respect to appellant's claim of rights under the First and Fourteenth Amendments and with respect to the construction and constitutionality of the statutes applied here, on the assumption that one waives his constitutional rights by applying for admission to the bar. (App., p. 52, *infra*) This assumption ignores a growing body of doctrine with respect to a state imposing "unconstitutional conditions" upon the granting of a privilege controlled by that state. Henderson, *The Position of Foreign Corporations in American Constitutional Law*, C. VIII, "The Doctrine of Unconstitutional Conditions" (1918); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562; *Frost Trucking Co.* v. *R.R.*

*Com.*, 271 U.S. 583. Comparisons with "public employees" are beside the point, if only because even such employees are not without constitutional rights. *Wieman* v. *Updegraff*, 344 U.S. 183; *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123.

The reliance by the court below upon *In re Summers*, 325 U.S. 561, seems misplaced. The Illinois Court was upheld in that case not because a bar applicant waives his constitutional rights but primarily because this Court accepted as authoritative the Illinois Court's interpretation of the lawyer's oath to support the Illinois Constitution as including a provision that a conscientious objector could not adhere to, the provision for militia service under certain remote conditions.[32] The tortuous militia argument is now completely ignored by the court below in its statement of the *Summers* case; it prefers instead to suggest that this Court there confirmed that Illinois's control over admission to the bar is so sweeping as to permit invasions of vital constitutional rights. (App., pp. 51-2, *infra*)

The mischief that can result, if the language of the court below with respect to "privileges" conferred by a

---

[32] 325 U.S. at 571-573; **cf.** 325 U.S. at 577-78. **Cf.** also **Application of Steinbugler,** 297 NY 713, 77 N.E. 2d 16.

We suggest that if the Illinois Court had been as eager here as it was in the **Summers** case to read into the oath of office particular constitutional provisions that had no explicit relation to the problem at hand, then it should have considered appellant's refusal to answer inquiries as to affiliations to be consistent with, if not supported by, the provision for an exclusive constitutional oath for civil officers. Art. V, Sec. 25, Constitution of Illinois (Brief below, pp. 70-73, 108-9; **cf.** brief below, p. 33, n2).

The existence of this provision indicates why the court below drew back from the finding that lawyers may be treated as public employees. It also points up another point of distinction between this matter (involving the private profession of law) and those found in **Adler v. Board of Education,** 342 U.S. 485, **Garner v. Los Angeles Board,** 341 U.S. 716, and even in **Communications Assn. v. Douds,** 339 U.S. 382 (where the use of statute-provided facilities, not the right to "practice" union leadership, was being denied).

state is taken seriously by those who ignore the politically inquisitorial fervor that calls it forth, may be beyond the power of any court to correct unless repudiation is immediate and decisive.

**6. Importance of the questions.** What has been said already may be indication enough of both the substantiality and the importance of the questions presented to this Court. This particular case has aroused interest in various quarters, partly because it was apparent several years ago that it suggested the nature of coming events.[33] As more and more test oaths and "loyalty" test proceedings are devised for the legal profession,[34] the independence of the bar is threatened and even those already admitted will begin to wonder if they dare to speak as had been their habit and as vigorously as had theretofore seemed necessary in the interest of their clients and of the community.[35] Serious damage will result unless a halt is called to developments that could have their effect even on the bar available to this Court as well as available to those federal courts which have no opportunity to review state action in bar admission matters.

---

[33] "The Anastaplo Case." 36 Chicago Bar Record 67 (Nov. 1954) (where the opinion of the court below in this matter is reproduced); Brown and Fassett, "Loyalty Tests for Admission to the Bar," 20 Univ. Chi. L. Rev. 480, 481-2, 501, 502 (1953); Sharp, "The Old Constitution," 20 Univ. Chi. L. Rev. 529, 541 (and notes 23, 24); London, "Heresy and the Illinois Bar: The Application of George Anastaplo for Admission," 12 Law. Guild Rev. 163 (1952).

[34] Brown and Fassett, **ibid.**; 36 A.B.A.J. 972 (1950); 37 A.B.A.J. 128, 319-20 (1951); 26 N. Y. S. B. Bull. 196 (1954); 39 A.B.A.J. 1084 (1953). Contra: 37 A.B.A.J. 123-125 (1951); 40 A.B.A.J. 404 (1954). **Cf. Application of Levy,** 214 F 2d 331 (C.A. 5th, 1954) (certiorari granted, Nov. 22, 1954, 23 Law Week 3142).

[35] Appellant has had occasion recently to develop, with an emphasis upon another aspect of the problem, his ideas with respect to the independence of the bar. Anastaplo, Review: Blaustein and Porter, **The American Lawyer,** 14 Law. Guild Rev. 178 (Winter 1954), supplemented by Anastaplo, Review: Drinker, **Legal Ethics,** 14 Law. Guild Rev. 144, 145-6 (Fall 1954).

Decisive action by this Court could correct this situation, both to preserve the Bar and to protect individuals in the exercise of their rights. Simply to sit back until matters deteriorate even more would be to invite developments for which there is no correction. Thus, there will be a few who will resist, for one reason or another, any "test-oath" impositions. This resistance will arouse the suspicions of an excitable majority who will question the dissenters' patriotism and general fitness. The language used by the majority will, in turn, incite the dissenters to issue statements and adopt attitudes that will make very difficult later compromise or reconciliation. Then, rationalizations will not be lacking to justify passion as the dissenters are eliminated from the bar; and appellate courts, pressed by other work and naturally inclined to treat generously the bar association committees which do so much work governing the bar, will acquiesce in what the majority have been moved to do. This acquiescence will be made all the easier since the challengers will be foolishly espousing unpopular views. In this way, individual expression on controversial issues will be suppressed and neither right nor reason will reign. And we will have additional proof for what has been already amply demonstrated, that "war is not the school of freedom."

These are the social considerations that call for immediate action by this Court. This Court, it is further suggested, also has an interest in correcting a "manifest wrong in the result" of a particular case. *Clyde* v. *Gilchrist,* 262 U.S. 94, 97. Thus, it is important not to leave unchallenged a decision which is erroneous, unjust and constitutionally invalid with respect to an applicant about whose qualifications for admission to the bar no one on the court below or on its committee can have any reasonable doubt.

**7. Federal-State relationships.** (Brief below, pp. 26-28, 101-112) In addition to the application of other constitutional limitations upon state action, we suggest that this Court has the power and obligation to examine the methods employed in the state courts which supply the bar of this Court and to correct state action which excludes an applicant who is qualified to practice both in his state and before this Court. Such a power would seem to rest in the paramount judicial body in the United States and would be comparable to Congressional power to evaluate and correct State electoral requirements. Although the Congressional power is derived from an explicit Constitutional provision, it provides a model for a Court that has never hesitated to enforce implied prohibitions against the burdening by states of federal instrumentalities. *McCullough* v. *Maryland,* 4 Wheat. 316 (1819). Of course, the power of states to admit is not, "while this Court sits," the power to deprive this Court of counsel. But this state power, if not examined scrupulously both for unwisdom as well as unreasonableness by this Court in situations where departures from usual and accepted practices are evident, is the power to affect adversely the quality of the bar of the Supreme Court of the United States as well as of the subordinate federal courts which are more limited in self-protection. The assertion of any latent power to examine state bar admission policies and practices would be particularly appropriate in an era when scholarly research and judicial action seem to be limiting the scope of previously accepted constitutional limitations upon governmental action.

It is suggested that this Court may not soon have another opportunity to curb "loyalty" enthusiasts among the bar where it can act in a situation in which it is so obvious that no possible harm can come to the bar of a particular state if this Court should cause appellant's rights to be upheld. As has been said before, not even the court below

or its committee can have any real doubt about appellant's qualifications for admission to the Illinois bar.

**In closing: the two follies.** It is arguable, of course, that it was folly for appellant, with impudent and imprudent talk about his rights and responsibilities, to tilt against "the many lawless and unrighteous deeds which are done in a state." But what the court below and its committee have done to obscure the issues and avoid appellant's challenges suggests that appellant was even more right, and certainly more effective, than he had first hoped.

The folly of the Illinois authorities, on the other hand, arises from the fact that they are protected from the consequences of their impulsive actions only by the costly resistance of those who take too seriously the dictates of both Constitution and Conscience. As Mr. Justice Brandeis has said,[36]

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

## CONCLUSION.

For the foregoing reasons, relating to both the general good and individual rights, we believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

GEORGE ANASTAPLO,
*Appellant, Counsel pro se*

GEORGE ANASTAPLO
6026 Ellis Avenue
Chicago 37, Illinois
January 11, 1955

[36] Dissenting in **Olmstead v. United States,** 277 U.S. 438, 479.

# APPENDIX

**Opinion of the Supreme Court of Illinois.***

*In re* GEORGE ANASTAPLO, No. 33149
3 Ill. 2d 471, 121 N.E. 2d 826
September 23, 1954

Petition and Appeal from refusal of Committee on Character and Fitness to grant certificate.

George Anastaplo, of Chicago, petitioner, *pro se.*

Leon M. Despres, Abner J. Mikva, Alexander L. Polikoff, and Bernard Weisberg, all of Chicago, for American Civil Liberties Union; Pearl M. Hart, of Chicago, and Jessica Davidson and Robert J. Silberstein, both of New York, N. Y. for National Lawyers Guild; and Stephen Love, of Chicago, *amici curiae.*

Mr. Justice Daily delivered the opinion of the court:

George Anastaplo, to whom we shall refer as petitioner, having successfully passed the Illinois bar examination, filed with the Committee on Character and Fitness for the First Appellate Court District, an application for admission to practice before the courts of this State, together with affidavits as to his good moral character and general fitness to practice law, as required by section IX of Rule 58 of this court. (Ill. Rev. Stat. 1951, chap. 110, par. 259.58.) Subsequently, and as further ordained by the rule, he appeared both before a two-man section of the committee and before the entire committee for the purpose of furnishing evidence of his moral character and good citizenship. Ultimately, on June 5, 1951, petitioner was advised that he had failed to prove such qualifications as to character and general fitness as, in the opinion of the committee, would justify his admission to the bar of Illi-

* See note, **supra**, page i.

nois. Petitioner did not seek a rehearing, as was his right, and while the committee has continued to refuse to issue him a certificate of character, it has held itself open to further suggestions and arguments of petitioner, presented through the media of letters and one further appearance of petitioner before the committee.

Petitioner has now filed in this court what is termed a "Petition and appeal from the refusal of the Committee on Character and Fitness * * * to sign a favorable certificate for admission to the practice of law for the Applicant and Motion to the Supreme Court of Illinois to provide for the admission of the Applicant to the practice of law in the state of Illinois." Although we have held that the discretion exercised by the committee on character and fitness will not ordinarily be reviewed, (*In re Frank,* 293 Ill. 263,) and it is well established that a petition for admission to the bar, though a judicial function, is an administrative act rather than a judicial proceeding, (*In re Summers,* 325 U.S. 561, 89 L. ed. 1795,) it is our opinion, in the light of petitioner's claims that the committee abused its discretion and that certain of his constitutional rights were infringed upon, there exist circumstances which should cause us to set the matter down for argument and opinion. (*In re Summers,* 325 U.S. 561, 89 L. ed. 1795; *Brooks* v. *Laws,* 208 Fed. 2d 18.) Accordingly, petitioner has filed a brief and argument, we have granted leave to the American Civil Liberties Union and to the National Lawyers Guild, as *amici curiae,* to file briefs in petitioner's behalf and have permitted Stephen Love, a Chicago attorney and one-time committee member who apparently did not concur in its action, to file his suggestions in the cause.

Looking to the record, to the committee report to this court, and to petitioner's brief, we find that the crux of the controversy is centered upon petitioner's refusal to

answer as to whether he was a member of the Communist Party or of any of the subversive organizations on the list compiled by the United States Department of Justice. When first asked if he was a member of the Communist Party petitioner responded that the question was an inquiry into his political beliefs and an "illegitimate question." Similar responses to similar questions appear in other portions of the record of petitioner's examination and at no time did he answer the question. Predicated upon these refusals, the committee, on the basis of their opinion that a member of the Communist Party, because of such membership, might not be able in good faith to take* the oath of lawyer to support the constitution of the United States and the constitution of the State of Illinois, then directed questions to petitioner designed to elicit his views in what the committee felt were pertinent areas of inquiry. Briefly summarized, as the result of the committee's questioning, petitioner expressed his opinion that a member of the Communist Party, otherwise qualified, should be admitted to the practice of law and that he could see nothing contradictory or incompatible between adherence to the tenets of that party and the taking of the oath to support the constitutions. Likewise, at this time, he expressed his belief in the doctrine of revolution and the overthrow of government by force of arms, saying that he would embrace such doctrine if he could not agree with the existing government, or found it unsatisfactory, and felt that force of arms was the only means to attain the end desired. He stated that such view would not be altered even though the existing government provided for peaceful and orderly means of change. In its report, the committee states that the views and opinions expressed by petitioner on these matters were not the basis for the denial of a certificate, but that the committee agreed such views increased the

* For an alternative reading, see note, p. i and p. 11, **supra.**

importance of petitioner's refusals to answer and made more necessary a complete answer on the subject of membership in the Communist Party, so that the committee could better determine the ability of petitioner to take the oath of attorney in good conscience and his good citizenship.

Petitioner presently contends that the committee abused its discretion and exceeded its function by inquiring into his political views, directly and indirectly, and charges that its action in denying him a certificate stems from hostility and differences of personal opinion rather than from considerations of his lack of moral character or general fitness to practice law. At the outset of our consideration of this point, we wish to say that we find nothing in the record to substantiate petitioner's conclusion that the committee was hostile to him or that its decision was motivated by personal opinions differing from his own. What does appear clearly is that the denial was based upon the doubts as to his ability to take the oath of lawyer in good conscience created by his refusal to answer whether he was a member of the Communist Party or other known subversive "front" organizations for that party. Thus our first consideration must be directed to whether petitioner's membership or nonmembership in the party was a relevant field of inquiry or whether the committee abused its discretion and exceeded its function.

In this jurisdiction it is firmly established that the power to regulate and define the practice of law is a prerogative of the judicial department, as one of the three divisions of the government created by article III of our constitution, an inherent adjunct of which is to prescribe regulations for the study of law and the admission of applicants for the practice of the profession. (*In re Day*, 181 Ill. 73; *People ex rel. Illinois Bar Ass'n.* v. *Peoples Stock Yards*

*State Bank,* 344 Ill. 462; *People ex rel. Chicago Bar Assn.* v. *Goodman,* 366 Ill. 346.) A concomitant principle, established by the decisions of this court, is that the right to practice law is a privilege, and a license for that purpose makes the holder an officer of the court, and confers upon him the right to appear for litigants, to argue cases and collect fees therefor, and creates certain exemptions, such as from the jury service and arrest on civil process while attending court. (*In re Day,* 181 Ill. 73, 80.) In the exercise of its judicial power over the bar, and in discharge of its responsibility for the choice of personnel who will compose that bar, this court has adopted Rule 58, (Ill. Rev. Stat. 1951, chap. 110, par. 259.58,) which governs admissions and provides, among other things, that applicants shall be admitted to the practice of law by this court after satisfactory examination by the Board of Examiners and certification of approval by a Committee on Character and Fitness. Section IX of the rule provides for the creation of such committees and imposes upon them the duty to examine applicants who appear before them for moral character, general fitness to practice law and good citizenship. Still another condition precedent to admission to practice law in this State, imposed by the legislature, is the taking of an oath to support the constitution of the United States and the constitution of the State of Illinois. (Ill. Rev. Stat. 1951, chap. 13, par. 4.) We think the conclusion inescapable that the inquiry of the committee must be directed, in part, to the ability of an applicant to take the required oath in good conscience. Such an oath requires loyalty to our government, as does any concept of good citizenship, thus inquiry aimed at determining the loyalty of an applicant, must be deemed to be relevant to a determination of the conditions for admittance fixed both by the statute and by the rule of this court.

In the case of *Dennis* v. *United States,* 341 U.S. 494, 95 L. ed. 1137, wherein the provisions of the Smith Act directed at conspiracy to teach or advocate the overthrow of the government by violence were held to be valid, we find an authoritative characterization of the Communist conspiracy and the purpose of the Communist Party in these terms: "Their conspiracy to organize the Communist Party to teach and advocate the overthrow of the Government of the United States by force and violence created a 'clear and present danger' of an attempt to overthrow the Government by force and violence." (341 U.S. 494, at 516-517, 95 L. ed. 1137, at 1156.) Prior to that case, in *American Communications Assn.* v. *Douds,* 339 U.S. 382, 94 L. ed. 925, where the supreme bench upheld the constitutionality of the non-Communist affidavit provision of the Labor Management Act, we find it stated by Mr. Justice Jackson concurring in part and dissenting in part, that "the Communist Party is somewhat different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law." He summarizes these differences, in part, as follows: "1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. • • • 2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. • • • 3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. • • • 5. Every member of the Communist Party is an agent to execute the Communist program." The Justice states that from such data "Congress could rationally conclude that, behind its political facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system."

(339 U.S. 382, at 424, 94 L. ed. 925, at 957.) And we observe that such a conclusion has been explicitly expressed by Congress in the recently enacted "Communist Control Act of 1954." In the preamble of such act, it is stated that "The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution." Similarly, courts of our sister States have recognized and agreed that the Communist Party is subversive and constitutes a continuing conspiracy against our government. (*Board of Education* v. *Wilkinson,* 125 Cal. App. 2d 127, 270 Pac. 2d 82; *Daniman* v. *Board of Education,* 306 N.Y. 532, 119 N.E. 2d 373; *Faxon* v. *School Committee of Boston,* (Mass.) 120 N.E. 2d 772.) In still another instance a Canadian court has stated categorically that a person subscribing to the Marxist philosophy is not a proper person to practice law. In *Martin* v. *Law Society of British Columbia,* 3 Dominion Law Reports 173 (1950) it is said: "The Marxist philosophy of law and government in its essence is so inimical in theory and practice to our contitutional system and free society that a person professing them is *io ipso* not a fit and proper person to practice law." Quite apart from these manifestations by the judiciary, we also think, to borrow a phrase from the *Faxon case,* it is a matter of common knowledge that "multidudes of people • • • regard with abhorrence the Communist Party and communism as that term is generally understood." This thought of our people is becoming more and more evident and is reflected in the increasing efforts of their elected representatives

to legislate both against the growth and the very existence of the Communist Party in our land.

Neither the committee nor this court, faced with the question of whether membership in the Communist Party is relevant to a determination of petitioner's good citizenship and his ability to take the oath of lawyer in good conscience, need be oblivious to the existence of that party and its established conspiratorial nature, nor to the view in which it is held by the people of this country. Aside from the fact that membership in an organization advocating the forceful overthrow of our government would give rise to questions concerning the sincerity of an applicant's oath of loyalty, it is proper to consider that the lawyer, as an officer of the court, holds a position of public trust, or at least of semipublic trust. As is stated in *In re Both*, 376 Ill. 177, 182: "Attorneys at law admitted to the bar of this State are officers of this court. • • • The relation of the court and its attorneys to the people is one of high responsibility, involving on the one hand complete trust and confidence and on the other absolute fidelity and integrity." Because of his training and the trust and confidence reposed in him, the lawyer is presented with extensive opportunity to impress his attitudes and views on the public and to effect the translation of those views into legislative action, for the legal profession, more than others, is looked to for political leadership and is expected to institute and guide legislative change. There also comes from the profession the judiciary which interprets the laws and, undoubtedly to a greater degree than from other professions, the legislators who enact and draft our laws and the men and women who administer them. Considering these functions of the lawyer, along with his position of being an officer of this court in whom public trust and confidence is reposed, this court, or its com-

mittees, would be derelict in their responsibility to the public, if, knowing of the Communist Party and its insidious aims, we stood mutely by and made no effort to thwart, or inquire into, its infiltration into the bar of this State. As one court has put it: "In the life-and-death struggle into which our people have been plunged by the monstrous conspiracy called communism, it is becoming more and more apparent that it is essential for the continuance of our national life that we know who is for us and who is against us. This is no time to allow any person who would destroy us, our liberties, our religious convictions, and our government to be employed in any branch of that government, • • •." (*Board of Education* v. *Wilkinson,* 125 Cal. App. 2d 127, 270 Pac. 2d 82, 86.) While technically not a governmental employee, a lawyer meets on common ground with one so employed, in that loyalty to the constitution is an inalienable condition to their service. In either case, Communist Party membership or communist activity is totally incompatible with such loyalty.

It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive "front" organizations

were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.

We are next met, however, by petitioner's contention that inquiries about his "political affiliations and organizational memberships" are unconstitutional, as being in derogation of the right to free speech guaranteed under the first and fourteenth amendments to the constitution of the United States. Though petitioner argues forcefully and at great length, it is our impression and interpretation that *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 94 L. ed 925, and *Dennis* v. *United States*, 341 U.S. 494, 95 L. ed. 1137, authoritatively establish that such an inquiry, under the circumstances presented, does not violate the constitutional mandate relied upon. The rationale of both cases is that belief in the overthrow of the government by force, in the face of the reality that beliefs are the springs to action, is a substantial enough interest to limit speech. They both say, that while one may be permitted to advocate and believe what he will, there is a clear and present danger in the Communist conspiracy from which a public evil will result, and from which the public has a right to be protected even though the constitutional right of free speech of some persons or groups are in some manner infringed. If this were not enough to refute the petitioner's claim, it is also stated in the *Douds case* (339 U.S. 382, 398, 94 L. ed. 925, 943-944,) that government's "interest in the character of members of the bar, *Re Summers*, 325 U.S. 561, 89 L. ed. 1795, 65 S. Ct. 1307 (1945), sometimes admit of limitations upon rights set out in the First Amendment."

In the *Summers case* an applicant for admission to the bar of this State was denied admittance, though otherwise

qualified, on the sole ground that he had conscientious scruples against war and would not use force to prevent wrong under any circumstances. The Supreme Court of the United States upheld our refusal and expressly held that our action did not violate the first amendment, as its demands are incorporated in the due-process clause of the fourteenth amendment. In analyzing the *Summers* decision during the course of the *Douds* opinion, the court said: "Again, the relation between the obligations of membership in the bar and service required by the state in time of war, the limited effect of the state's holding upon speech and assembly, and the strong interest which every state court has in the persons who become officers of the court were thought sufficient to justify the state action." (339 U.S. 382, 405, 94 L. ed. 925, 947.) We see no substantial difference, or basis for a different application of the limitations on the right of free speech, between an inquiry into Summers' belief that he would not bear arms in support of his government and an inquiry, where the existence of a clear and present danger is known, directed to petitioner's membership in an organization which advocates the overthrow of the same government, by force of arms if necessary. Measured by popular belief and opinion, we think that one who would embrace a movement to overthrow our government by force of arms is relatively more unqualified to fulfill his obligations as a lawyer than is a person who, because of conscientious scruples, would not use force of arms to prevent wrong. The latter admits of some loyalty to his government, the former, none.

Further, in regard to the contention that petitioner's right of free speech has been infringed upon by the inquiries of the committee, we may also consider the established principle of this jurisdiction that the practice of law is a privilege, not a right. In granting that privilege we may impose any reasonable conditions within our control

and if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Among other things, the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal constitutions. Such conditions are almost universal in this land and, so far as we can ascertain, their reasonableness has never been attacked. When an applicant, knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech. This has been the principle applied in the field of public employment to sustain a finding that such employees agree to suspend their constitutional rights of free speech by the implied terms of their employment, (See: *McAuliffe* v. *City of New Bedford,* 155 Mass. 216, 29 N.E. 517; *Drury* v. *Hurley,* 339 Ill. App. 33, 88 N.E. 2d 728; *Joyce* v. *Board of Education,* 325 Ill. App. 543, 60 N.E. 2d 431; *Faxon* v. *School Committee of Boston,* (Mass.) 120 N.E. 2d 772; *Daniman* v. *Board of Education,* 306 N.Y. 532, 119 N.E. 2d 373,) and we think it has equal application here. In seeking the privilege of admission before this court, petitioner must be deemed to have agreed to waive his constitutional right of free speech against relevant inquiry.

We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied.

*Petition denied.*